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May 21, 2009

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, DC 20554

Subject: In the Matter of Payphone Access Line Rates, Docket CC No. 96-128

Dear Ms. Dortch:

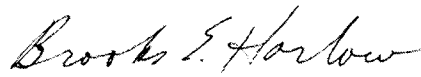
In accordance with Section 1.1206 of the Commission's rules, 47 C.F.R. Section 1.1206, we hereby provide you with notice of an oral and written ex-parte, presentation in connection with the above-captioned proceeding. On May 20, 2009, Brooks Harlow of Miller Nash LLP, and Robert Aldrich, of Dickstein Shapiro, LLP met with Jennifer Schneider, advisor to Acting Chairman Copps, Nicholas Alexander, advisor to Commissioner McDowell, and Al Lewis, Marcus Maher, and Pamela Arluk (by phone), of the Wireline Competition Bureau. Mr. Harlow appeared on behalf of the Northwest Public Communications Council ("NPCC") and Mr. Aldrich appeared on behalf of the American Public Communications Council.

At the meeting we discussed the matters summarized in the attached document, which was provided at the meetings. Specifically we discussed the background and current status of *NPCC v. Qwest*, pending before the Oregon PUC and the relationship of that case to petitions pending in Commissioner Docket CC 96-128. We also reminded the Commission of the OPUC's 2005 request for Commission guidance as reflected in the attached letter from the PUC Commissioners to the Commissioner. A copy of the attached letter was also provided at the meetings. Further, we discussed the procedural options and timing of potential formal or informal responses to the PUC's request. Finally, we encouraged the Commission to act promptly on the pending petitions in Docket 96-128 and in so doing to address the OPUC's request for guidance.

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We trust you will find this information to be useful. Should you have any questions or require any additional information, please contact the undersigned counsel directly.

Very truly yours,

A handwritten signature in cursive script, reading "Brooks E. Harlow".

Brooks E. Harlow, P.C.

cc: Ms. Jennifer Schneider (via e-mail)
Mr. Nicholas Alexander (via e-mail)
Mr. Albert Lewis (via e-mail)
Mr. Marcus Maher (via e-mail)
Ms. Pamela Arluk (via e-mail)
Mr. Robert Aldrich (via e-mail)

NORTHWEST PUBLIC COMMUNICATIONS COUNCIL ("NPCC")
In the Matter of Payphone Access Line Rates – CC Docket No. 96-128

Oregon Current Status

- **Oregon PUC Will Proceed Without FCC Guidance:** Despite the lack of requested FCC guidance, on February 6, 2009, the PUC lifted a stay that it had had in place for four years pending FCC guidance that the PUC was expecting in CC Docket 96-128. Prehearing Conference Report (OPUC, Feb. 6, 2009).
- **The Oregon PUC Still Wants Guidance:** The PUC clearly would prefer not to proceed with the Oregon case absent guidance from this Commission:

“More than four years later, the FCC has yet to issue its Order in response to the requests for a declaratory ruling. [T]he ALJ’s comments [regarding the need for FCC guidance] remain as true today as they were in 2005”

Order No. 09-155 at 7 (OPUC, May 4, 2009) (emphasis added).

- **The Oregon PUC Still Needs Guidance:** The PUC still fails to understand that fraud screening services on payphone access lines are subject to the same federal regulatory requirements as the lines themselves, including New Services Test pricing and the refund requirements of the 1997 “*Waiver Order*”:

“Although NPCC asserts that its claims for CustomNet service overcharges arise out of the same legal theories as for PAL services, without a definitive statement from the FCC that services such as CustomNet were within the scope of the original proceeding, we are not so certain.”

Id. (emphasis added).

Background

- **Oregon Is Unique:** The payphone-related facts in Oregon are unique, and distinct from the facts arising in every other state, in two important respects:
 - On November 23, 2005 – ***three and a half years ago*** – the Oregon PUC asked the FCC for guidance on the unresolved issue of how to address Qwest’s unjust enrichment from non-compliant payphone rates.
 - In Oregon, ***Qwest’s unjust enrichment remains an open and unresolved issue*** with no *res judicata* or pre-emption issues for the FCC to resolve.
- **No Mandate Necessary:** NPCC has not asked the FCC to specifically resolve the unjust enrichment (*i.e.*, refund) issue. The Oregon PUC can address the issue of refunds for Qwest’s unjust enrichment.
- **This Is Not About Ratemaking:** Nor is NPCC asking the FCC to revisit or adjust the payphone services rates that the Oregon PUC has already established. That issue is settled.
- **Oregon Would Like Guidance:** What is not settled in Oregon, and the issue on which the Oregon PUC sought guidance from the FCC three and a half years ago, is whether Qwest should refund the amount it overcharged NPCC’s members during the six-year period (1996-2002) in which its payphone line rates were non-compliant.
- **NPCC and Qwest Have Not Been Able to Settle the Matter:** After many years of regulatory proceedings and litigation the parties have been unable to settle.
- **What NPCC Has Been Seeking:** NPCC respectfully requests that the FCC respond to the Oregon PUC’s request for guidance on the issue of refunds for Qwest’s unjust enrichment, with the following key points.
 - The FCC should recognize that in Oregon — unlike every other state where refunds are at issue — the PUC’s consideration of refunds remains open and pending. Thus, Qwest cannot claim that federal pre-emption and/or *res judicata* bar NPCC’s refund claims.
 - The FCC should clarify that its payphone *Waiver Order* should be interpreted to mean that regulatory delays and legal appeals in implementing compliant payphone rates do not vitiate Qwest’s obligation to pay refunds for the period in which its payphone access line rates in Oregon were non-compliant.
 - The FCC should reject, yet again, the claim that Qwest had the legal authority to self-certify that its rates were compliant.
 - The FCC should reject, yet again, the claim that the FCC’s *Wisconsin* orders somehow “changed” the FCC’s new services test.
 - The FCC should respect and acknowledge the Ninth and Tenth Circuits’ holdings that the filed tariff doctrine does not bar refunds under the *Waiver Order*.



Oregon

Theodore R. Kulongoski, Governor

Public Utility Commission

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November 23, 2005

Chairman Kevin Martin
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

RE: CC docket 96-128

Dear Chairman Martin:

We are writing to request prompt Commission action in CC Docket 96-128, the Consolidation Petition proceeding. Commission action in the docket would allow states, including Oregon, to determine whether incumbent local exchange carriers are bound by the refund provisions of Commission Order DA 97-805 (the *Waiver Order*).

This letter is prompted by a specific issue we are addressing. Specifically, we must determine whether the *Waiver Order* requires Qwest to refund a portion of the intrastate Payphone Access Line (PAL) rates paid by Payphone Service Providers (PSPs) since April 15, 1997, because those rates do not comply with the "New Services Test" established in the Commission's *Payphone Orders*. This determination has been mandated by the Oregon Courts.

The Oregon Commission could, of course, interpret Order DA 97-885 in an order. If we were to do so, however, we are certain that either Qwest or the PSPs would appeal our decision. This would likely lead to several years of litigation concerning issues that can best be resolved by your Commission. The only way to avoid such a scenario would be for the Commission itself to interpret the *Waiver Order*. That is why we are requesting that the Commission act as expeditiously as possible in CC Docket 96-128.

Thank you for your consideration.

Lee Beyer
Chairman

John Savage
Commissioner

Ray Baum
Commissioner

cc: Brooks Harlow, Miller Nash
Don Mason, Qwest